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IN THE

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Supreme Court of the United States

OCTOBER TERM, 1983

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Petitioner,

v.

CLARENCE E. BENNETT et al.,

Respondents.

— and —

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Petitioner,

v.

DAN R. SANDFORD et al.,

Respondents.

(Consolidated)

On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Must the writ sought by petitioner be denied where petitioner seeks to review a Court of Appeals decision that the complaint states a RICO claim against petitioner and the complaint is not before this Court?
2. Must the writ be denied where none of the reasons for granting such a writ is present?
3. Do the civil provisions of RICO afford respondents a damage remedy against a business organization such as petitioner which has conducted, and strongly participated in the conduct of, the affairs of an enterprise through a pattern of racketeering activity, thereby causing millions of dollars of direct injury to the respondents?
4. Do the civil provisions of RICO afford respondents a damage remedy against a business organization such as petitioner which has conspired with others to conduct, or participate in the conduct of, an enterprise through a pattern of racketeering activity, thereby causing millions of dollars of direct injury to the respondents?

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The petition's description of the opinions below omits to state that both the panel opinion and the *en banc* opinion of the Eighth Circuit were *unanimous* with respect

to the RICO Act count alleged by the plaintiffs against the petitioner (and thirty-one other defendants). The only dissent, which appears in the *en banc* opinion, relates solely to a different count, which was alleged against a different defendant.

STATEMENT OF THE CASE

Even though petitioner Prudential seeks to persuade this Court that plaintiffs' complaint does not state a claim against it under the RICO Act, Prudential has failed to include the complaint in its appendices.* The omission, which at first blush seems extremely strange, makes it easier for Prudential to misrepresent the facts here, as by suggesting that this case involves nothing more than "garden-variety civil misrepresentation, anticipatory breach of contract, and consumer claims" or "ordinary commercial litigation." (Pet. at i, 11.) Nothing could be farther from the truth. What is involved here, as the following summary shows, is an enormous, sophisticated, nationwide, criminal fraud which has cheated thousands of elderly people out of many millions of dollars, and in which Prudential played a central role.

* As we point out later, this omission is itself reason for denying the petition, since there is nothing before the Court which would permit it to deal with the issues raised.

Because the complaint is lengthy (forty-nine legal-size pages, containing 122 paragraphs), it would cost plaintiffs more than \$1,500 to print it as an appendix. Because of their limited funds, plaintiffs cannot afford to do so.

There were 408 plaintiffs in this litigation originally, all of them elderly residents of a retirement community. Fifty-five plaintiffs have died during the three and a half years the litigation has been pending. The average age of the surviving plaintiffs is believed to be about eighty. Many of them, as one would expect, are in poor health—a fact which has special significance here, for reasons explained below. At the time the litigation was commenced, all of the plaintiffs were residents of a "life-care" retirement community known as John Knox Village located in Lee's Summit, Missouri. John Knox Village is the largest life-care retirement community in the country; at the time the litigation was commenced, the Village was the size of a small town, having more than 2,500 residents.

Subsequent to the commencement of the litigation, some of the plaintiffs moved out of the Village, in most cases because of the grave financial condition of the Village and other problems resulting from the defendants' massive fraud. Many of the remaining plaintiffs are unable to leave the Village because their financial investment in the Village left them without the financial resources to do so.

The Criminal Defrauding Of The Plaintiffs

There are thirty-three defendants. (Only Prudential has sought *certiorari*.) All of the defendants, including Prudential, were involved in the ownership, management or operation of the Village, and in the tragic injury which has been suffered by the plaintiffs.

The two central defendants are Kenneth Berg and Prudential. Berg is an ordained Presbyterian minister who founded the Village and controlled it for many years. Berg promoted the Village as a religiously oriented community and a safe, secure investment—a place where the

retired elderly could spend the rest of their years in peace and security, receiving numerous services and benefits *for life.**

"Life-care" was what was advertised. Claiming to be motivated by such noble considerations as "the spirit of Christ" and "the Golden Rule . . . which makes it possible for all of us to live together as a happy Christian family," and emphasizing his "purpose in being involved in this retirement home movement as a minister is not to provide shelter alone, but spiritual care, nurture and oversight at a time when people need it most," Berg, together with his cohorts, promoted life-care at the Village from coast to coast. Religious names were constantly used in connection with the ownership and operation of the Village, such as John Knox Village, Evangelical Christian Social Services and Christian Services International, Inc.—all of which were profit-making organizations controlled by Berg.

The promotions coupled these religious themes with the most categorical assurances as to economic and financial soundness and honesty in the operation of the Village. Prospective residents were told, for example, that "a non-profit motive in dealing with the needs of Senior Citizens was to be preferred. Why should individuals profit hugely off the suffering of the aged?" They were told, over and over again, "that John Knox Village is financially

* Berg is presently under indictment in Alabama for fraud in connection with a retirement home in that state. He is also being sued or under investigation by a number of other states and earlier this year was the subject of a Federal Trade Commission complaint and cease and desist order relating to many of his fraudulent practices in connection with John Knox Village and other retirement homes or communities with which he has been involved. See *In the Matter of Christian Services International, Inc.*, 3 Trade Reg. Rep. (CCH) ¶22,009 (F.T.C. File No. 7823081, announced April 25, 1983).

sound," that the Village's auditor (defendant Snyder, Grant & Muehling) and defendant Prudential "say we are financially sound," and other words to the same effect. Not only was the Village financially sound, it also "will be kept on a sound financial basis, and it will be reviewed regularly by people who care about you." "Certain checks and balances protect the applicant's interests and investment in this Unique Plan." (Emphasis added.)

These nationwide promotions were enormously successful. Thousands of elderly persons, including the plaintiffs—widows, widowers, retired couples—streamed into the Village from all over the country* and purchased life-care contracts. Those contracts required the payment of an initial lump sum, commonly called an Entrance Endowment, ranging in amount from approximately \$9,000 to more than \$50,000, plus a substantial monthly charge commonly referred to as a Monthly Service Charge. The contracts promised the plaintiffs (and other Village residents) the right to occupy specified housing units in the Village and to receive numerous services and benefits *for life*—in short, life-care. Not a few of the plaintiffs paid all or most of their life savings as their Entrance Endowment for life-care, a principal element of which is the promise of *unlimited nursing home care* at the Village for those who require it, at no charge except for certain incidentals such as food and drugs.

As the Court is aware, the fear that prolonged nursing home care will be required, and that it will be beyond

* The uncontradicted facts in the court record below show that a large number of the thousands of present and former residents of the Village, including many of the plaintiffs, resided outside Missouri at the time they moved to the Village; that throughout its existence, advertisements for the Village have been carried by newspapers, radio, television and direct mailings outside Missouri; and that salespersons for the Village regularly traveled outside Missouri to promote the Village and sell life-care contracts.

one's financial means, haunts the elderly. But the plaintiffs and other prospective residents of John Knox Village were promised that this fear was one that would be irrelevant to them. The nationwide promotions of the Village stressed this—emphasized that what they were being offered and what they would be buying was "the precious peace of mind that comes with LIFE-CARE" and that "AT OUR LIFE-CARE COMMUNITY YOU CAN LIVE IN A BEAUTIFUL APARTMENT AND NEVER WORRY ABOUT LOSING IT OR PAYING A MAJOR MEDICAL BILL FOR THE REST OF YOUR LIFE." (Emphasis in originals.) As one pamphlet summed up the "Village Life-Care" which was being promoted and sold:

"Life-Care is simply a written guarantee to you that all the many facilities and services of the Village explained below will be at your disposal for life once you are one of our residents."

This is what the plaintiffs were promised, this is what they bargained for and thought they were purchasing, and this is what they have paid many millions of dollars for.*

The true facts, however, were quite different, tragically different. As the complaint alleges, in the minds of Berg and his associates, the Village was little more than a fraudulent vehicle by which they unlawfully enriched themselves in numerous ways, and for the most part secretly, at the expense and to the great damage of the plaintiffs and others who purchased life-care contracts. The 122-paragraph complaint details how the Berg group milked the Village in countless ways, fraudulently diverting millions which had been paid for life-care into their

* Moreover, a typical life-care contract assured prospective residents that the Village would be "operate[d] at the lowest possible cost to the Occupant, consistent with sound economic principles."

own pockets and into other of their ventures. Throughout the relevant period here, and contrary to representations which were made, the reserves *without which life-care could not possibly be provided* were not being set aside, because of these fraudulent diversions. What occurred here was the same as if those in control of an insurance company fraudulently pocketed millions paid as insurance premiums instead of establishing the reserves required to pay future benefits: For some time, in such cases, the company will be able to pay benefits and conceal the fraudulent diversions by using incoming premiums to pay benefits, but at some point that becomes no longer possible and collapse becomes unavoidable.

The result of all of this is that, after the payment of over \$75 million in Entrance Endowments and Monthly Service Charges by plaintiffs and other residents, the Village is insolvent, on the verge of bankruptcy and financially nonviable. Plaintiffs and other residents have experienced a marked deterioration of services and benefits, together with large increases in their Monthly Service Charge, all because millions which had been paid in to fund their life-care were stolen.

Plaintiffs are prepared to show at trial that the Village was pervasively fraudulent and financially nonviable when plaintiffs were induced to purchase their life-care contracts, that the financial condition of the Village has worsened drastically since this litigation was commenced, that the future of the Village is hopeless, and that, as a consequence, the plaintiffs, all of whom came to the Village and invested large sums in it under the deliberately promoted impression that it was a religiously oriented, honestly run, financially secure place where they could spend the remainder of their lives with security and dignity, are now faced with the tragedy of collapse of the Village and the loss of their homes, their life-care and the

millions of dollars they paid for life-care. At no time during the three and a half years of this litigation has Prudential or any other defendant ever denied the hopeless financial condition of the Village as a life-care community. Were it not for the pendency of this litigation and the dramatic effect on the litigation of an outright collapse of the Village, such a collapse would have been permitted to occur long ago.

Plaintiffs would emphasize that this tragedy is not the result of mere mismanagement, miscalculation or incompetence, but, rather, of deliberate nationwide, criminal fraud, as alleged in the complaint, perpetrated both in the inducement of the plaintiffs to purchase life-care contracts and move to the Village, and in the operation of the Village.

***Prudential's Participation In The Fraud**

In a petition dominated by misrepresentations, the worst is the contention that Prudential did no more than act as mortgage lender. The complaint tells a far different story, as is now summarized.

Prudential had great legal powers over the Village, Berg and his companies by reason of the provisions of the mortgage documents. In addition, Prudential had enormous *de facto* power over them, stemming from Prudential's ability to grant or withhold the millions of dollars of loans on which they were completely dependent. This combination of legal and *de facto* powers gave Prudential the virtual-

* On October 14, 1983, after the remand by the Eighth Circuit, plaintiffs filed an amended complaint with the District Court. The amended complaint contains a long, detailed section describing Prudential's central role in the fraud complained of. These allegations are in large part based on information not available to plaintiffs when this litigation was commenced but which was obtained through discovery prior to the dismissal by the District Court.

ly unlimited power to control the affairs of the Village, Berg and his companies, including the operation, management, marketing practices and finances of the Village.

Prudential frequently exercised this power, including the constant support of the fraudulent conduct discussed earlier in this brief. The fact is that, as a practical matter, those in immediate charge of the affairs of the Village could not do anything of importance without Prudential's approval. This condition continues to exist at the present time.

The complaint alleges at length Prudential's role in conducting and participating in the conduct of the affairs of the Village, and its role as a co-conspirator with Berg and others in the commission of the fraudulent acts complained of through a pattern of racketeering activity (numerous mail and wire fraud violations). The complaint alleges how Prudential was responsible for maintaining Berg in control of the Village, and describes in great detail how Prudential, even as late as 1978, when there could be absolutely no doubt as to its knowledge of the massive fraud which had been committed, engaged in many determined efforts to support Berg and his cohorts and the criminally fraudulent conduct in which they had been engaged; to conceal this unlawful conduct from the Village residents, prospective purchasers of life-care contracts and others; and to lull those persons into a belief that all was well and that there had been no wrongdoing. This continued even after some of the residents, having become suspicious and concerned, banded together in 1978 to attempt to uncover wrongdoings which had been committed and to protect their rights. Prudential's reaction was to seek to thwart these efforts, all pursuant to the unlawful conspiracy mentioned above. Several specific examples of Prudential's efforts in this regard are detailed in the complaint.

This conduct by Prudential was due to its heavy financial involvement with Berg and his various ventures, and Prudential's desire not to do anything which might jeopardize that relationship or the more than \$75 million which Prudential had invested in those ventures. *In essence, Prudential was Berg's partner.* The closeness of the relationship is indicated in part by the fact, as alleged in the complaint, that when Prudential's national General Manager, Real Estate Investments, retired in 1973, he went to work as Director of Public Relations at the Village and also became Executive Vice President of Christian Services International, Inc., which was Berg's company that controlled and managed the Village during the relevant period.

On top of all this, as the complaint emphasizes, throughout its long relationship with the Village prior to the commencement of this litigation, Prudential knowingly permitted Berg to falsely represent to purchasers and prospective purchasers of life-care contracts that Prudential would ensure the financial stability and economic survival of the Village, and to falsely hold out Prudential's name and supposed oversight of the Village's finances and other affairs as assurances of the sound financial condition of the Village and the propriety and honesty of the way its affairs were conducted. At the trial of this litigation, plaintiffs will show that these fraudulent uses of Prudential's name, which Prudential knowingly permitted and even encouraged, were a material factor in the decisions of many plaintiffs to purchase life-care contracts.

In view of these facts, Prudential's contention that it is being charged with fraud under RICO merely because it was a mortgage lender to the Village is frivolous. What the facts in the complaint show is that, as we stated earlier, Prudential played a central role in the massive fraud here, along with its partner, Kenneth Berg.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS FAILED TO PRESENT THE COURT WITH ANY FACTUAL BASIS FOR DECIDING THE QUESTIONS SOUGHT TO BE REVIEWED.

It is obvious that it is impossible to decide whether the Eighth Circuit's decision that the complaint states a RICO claim against Prudential should be granted review without the complaint being before the Court. Yet, as we pointed out earlier, Prudential (revealingly) has failed to include the complaint in its appendices. Neither the panel opinion nor the *en banc* opinion below is sufficient for this purpose, since they fail to disclose most of the crucial allegations of the 122-paragraph complaint and instead merely allude to some of the allegations in the most cursory fashion.

For this reason alone, the writ should be denied.

II.

THE "QUESTIONS PRESENTED" IN THE PETITION MISCHARACTERIZE THE FACTS HERE.

This reason for denying the writ is closely related to the preceding reason (petitioner's failure to include the complaint in its appendices) since the central question stated in the petition:

"1. Does the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-1968 (1976 & Supp. V 1981), create a federal treble damage cause of action and a federal forum for garden-variety civil misrepresentation, anticipatory breach of contract, and consumer claims?"

is based on fiction rather than fact, as is graphically made plain by our statement of the case.

The same is true of the other two "questions presented" in the petition:

"2. Does this Court's opinion in *United States v. Turkette*, 452 U.S. 576 (1981) compel the federal courts to grant standing, jurisdiction, and a cause of action to consumers who cannot allege any commercial harm proximately caused by a violation of the Act but, to the contrary, seek treble damages for alleged mail fraud?

"3. Is a mortgage lender deemed as a matter of law to be 'associated with' its borrowers within the meaning of the statute so as to make it liable for their alleged misconduct?"

It is difficult to understand what the petitioner thought it would achieve by so mischaracterizing the facts here. Regardless of what it had in mind, however, these questions bear no relation to the actual facts in this litigation.

III.

NONE OF THE REASONS FOR GRANTING SUCH A WRIT IS PRESENT HERE.

None of the reasons set forth in Rule 17 of this Court's rules exists here. Nor does any other reason exist for granting the writ. Practical evidence of this is found in the fact that, of the thirty-three defendants in this litigation, only Prudential has sought the writ.

Petitioner's efforts to create the impression that there is conflict or at least disarray among the circuits is transparently without merit. The facts are that the Eighth Circuit's *en banc* opinion was unanimous on the issues involved here, and every Court of Appeals which has considered the questions posed by petitioner has unanimously

rejected petitioner's contentions. See *Moss v. Morgan Stanley*, No. 83-7120, slip. op. at 20-30 (2d Cir. Sept. 9, 1983); *Schacht v. Brown*, 711 F.2d 1343, 1350-61 (7th Cir. 1983). The Sixth and Eleventh Circuits have also upheld the applicability of civil RICO in business contexts and in doing so implicitly rejected petitioner's contentions. The Sixth Circuit, in *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94 (6th Cir. 1982), affirmed the issuance of an injunction sought in a shareholders' civil RICO action founded on the conduct of a corporate promoter. The Eleventh Circuit, in *Morosani v. First National Bank of Atlanta*, 703 F.2d 1220 (11th Cir. 1983), overruled limitations on RICO adopted by the district court in *Kleiner v. First National Bank of Atlanta*, 526 F. Supp. 1019 (N.D. Ga. 1981), and reinstated the RICO complaint of a borrower against a bank. Moreover, three other circuits have held a link to organized crime is not necessary for a criminal RICO action. See *U.S. v. Vignola*, 464 F. Supp. 1091 (E.D. Pa. 1979), aff'd. 605 F.2d 1199 (3d Cir. 1979); *U.S. v. Grande*, 620 F.2d 1026, 1030 (4th Cir. 1980); *U.S. v. Rubin*, 559 F.2d 975, 991 n.15 (5th Cir. 1977); *U.S. v. Campanale*, 518 F.2d 352, 363 (4th Cir. 1975). These decisions in RICO criminal cases are relevant for the reason that the essential elements of both criminal and civil RICO violations are identical.

Similarly uniform in rejecting petitioner's contentions are all of the scholarly commentators who have dealt with these issues. See, e.g., Blakey, *RICO Civil Fraud Action In Context: Reflections On Bennett v. Berg*, 58 Notre Dame L.Rev. 237 (1982); Strafer, Massemi and Skolnick, *Civil RICO In The Public Interest: "Everybody's Darling,"* 19 Am.Crim.L.Rev. 655 (1982); Note, *RICO: The Temptation And Impropriety Of Judicial Restriction*, 95 Harv.L.Rev. 1101 (1982). Especially significant is the

referenced article by Professor G. Robert Blakey, who, as Chief Counsel of the Senate Subcommittee on Criminal Law and Procedure of the U. S. Senate, was the principal draftsman of the RICO statute. *U.S. v. Lee Staller Enterprises, Inc.*, 652 F.2d 1313, 1319 n.10 (7th Cir. 1981).

There are two additional reasons for denying the writ sought here. One is that this Court has traditionally declined invitations to decide issues of the type raised by the petition in the absence of a factual record. No such record exists here, of course. The other reason for denying the writ is the very advanced age of the plaintiffs. Fifty-five plaintiffs have already died since this litigation was commenced three and one-half years ago. The litigation was pending in the Court of Appeals for more than two years. If this Court were to grant the writ, how many plaintiffs will be alive when the Court renders its decision on the merits? How many more plaintiffs will have become so old or so ill that they will be unable as a practical matter to have their day in court?

IV.

THE EIGHTH CIRCUIT'S REFUSAL TO ENGRAFT COURT-MADE LIMITATIONS ON RICO IS CONSISTENT WITH THE LANGUAGE OF THE STATUTE AND DECI- SIONS OF OTHER CIRCUITS.

Distilled to its essence, Prudential's position is that this Court should amend the RICO Act in several respects. All of Prudential's contentions were rejected by the appellate decisions and scholarly commentators referred to in the preceding section of this brief, including most emphatically by the principal draftsman of the statute. The circuits' unanimous conclusion that business crimes should not be exempted from RICO and that petitioner's other contentions should be rejected reflects the fact that the

statute is unambiguous. Absent "clearly established legislative intent to the contrary," the plain language of RICO must be deemed conclusive. *U.S. v. Turkette*, 452 U.S. 576, 580 (1981). And here, there is no legislative intent to the contrary. The history of the statute shows Congress's intention that RICO be enforced as enacted, and that is what all of the Courts of Appeals which have dealt with these issues have done. Their decisions are consistent with the congressional directive that, "The provisions of this title shall be liberally construed to effectuate its remedial purposes." 18 U.S.C. §1961. (Pub.L. 91-452, Title IX, Section 904, 84 Stat. 94.)

Petitioner's suggestion that guidance from this Court is needed since RICO brings the federal government into areas that formerly were the sole province of the states is misguided. This Court has already provided such guidance: "[T]he language of the statute and its legislative history indicate that Congress was well aware that it was entering a new domain of federal involvement through the enactment of this measure." *U.S. v. Turkette, supra*, 452 U.S. at 586.

This Court and the circuits are therefore unanimous: RICO should be enforced as enacted, unencumbered by any artificial limitations that would effectively create a business-crime exception to its prohibitions and make the civil damage provisions of the statute of illusory value only.

SUMMARY OF REASONS FOR DENYING THE WRIT

In summary, respondents state the following reasons for denying certiorari in this litigation:

1. It is impossible to decide whether the complaint states a RICO claim against Prudential without the complaint being before the Court.
2. The "questions presented" in Prudential's petition assume facts which are totally at odds with the actual facts in this litigation. The actual facts reveal a massive, sophisticated, nationwide, criminal fraud which is precisely the kind of business corruption which RICO was aimed at.
3. Neither the reasons set forth in Rule 17 of this Court's rules nor any other reason for granting the writ is present here. Moreover, to grant the writ would be a grave and in some cases fatal disservice to the elderly plaintiffs, who have already endured three and one-half years of wandering through the judicial maze without an opportunity to have their day in court.
4. This Court must respect the congressional intent underlying the RICO Act, a statute which is unambiguous both in language and design. Prudential's contentions, which amount to an invitation to the Court to amend RICO, should be rejected.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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